

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1205

B
P/S

To be argued by
PATRICIA ANNE WILLIAMS

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1205

UNITED STATES OF AMERICA,

Appellee,

—v.—

MARK FREDERICK BUTHORN, JR.,

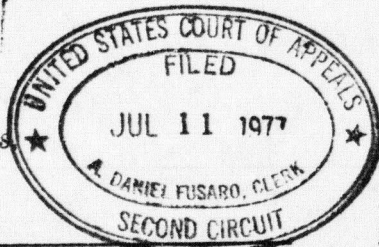
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.

PATRICIA ANNE WILLIAMS,
GEORGE E. WILSON,
FREDERICK T. DAVIS,
Assistant United States Attorneys
Of Counsel.



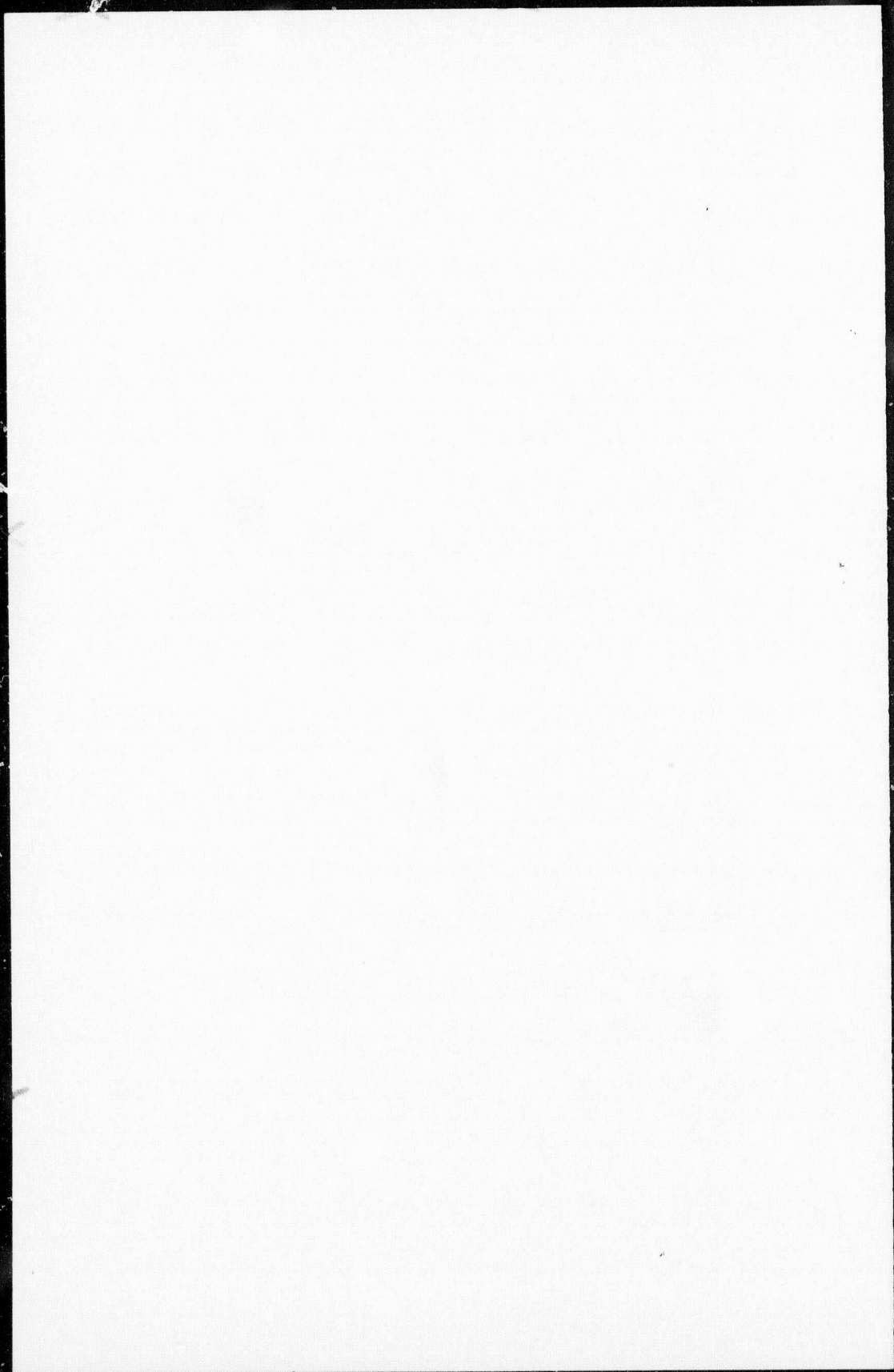


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
The Government's Case	2
A. Synopsis	2
B. Dr. Buthorn's Services	3
The Defense Case	5
The Government's Rebuttal	7
ARGUMENT:	
POINT I—The Trial Judge's Conduct Did Not De- prive Buthorn of a Fair Trial	8
POINT II—The Trial Court Properly Admitted Evi- dence of a Subsequent Civil Dispute	12
POINT III—Neither of the Two Grand Juries that Returned the Superseded and the Superseding Indictments Was Misled as to the Nature of the Testimony They Received	17
POINT IV—The False Statements Made by Buthorn Were Made in a Matter Within the Jurisdiction of a Federal Department or Agency	22
CONCLUSION	27

TABLE OF CASES

<i>Geders v. United States</i> , 425 U.S. 80 (1976)	9, 10
<i>Quercia v. United States</i> , 289 U.S. 466 (1933)	9
<i>United States v. Adler</i> , 380 F.2d 917 (2d Cir.), <i>cert. denied</i> , 389 U.S. 1006 (1967)	25

<i>United States v. Bertolotti</i> , 529 F.2d 149 (2d Cir. 1975)	20
<i>United States v. Boatner</i> , 478 F.2d 737 (2d Cir.), cert. denied, 414 U.S. 848 (1973)	11, 12
<i>United States v. Brandt</i> , 196 F.2d 653 (2d Cir. 1952)	9
<i>United States v. Candella</i> , 487 F.2d 1223 (2d Cir. 1973), cert. denied, 415 U.S. 977 (1974)	22
<i>United States v. Caniff</i> , 521 F.2d 565 (2d Cir. 1975), cert. denied sub nom. <i>Benigno v. United States</i> , 423 U.S. 1059 (1976)	16
<i>United States v. Cheung Kin Ping</i> , Dkt. No. 76-1362, slip op. 2063, 2069 (2d Cir., Feb. 28, 1977) ...	10
<i>United States v. Chanen</i> , 549 F.2d 1306 (9th Cir. 1977)	20
<i>United States v. Corr</i> , 543 F.2d 1042 (2d Cir. 1976)	17
<i>United States v. D'Anna</i> , 450 F.2d 1201 (2d Cir. 1971)	12
<i>United States v. DeSisto</i> , 289 F.2d 833 (2d Cir. 1961)	9, 11
<i>United States v. Estepa</i> , 471 F.2d 1132 (2d Cir. 1972)	18
<i>United States v. Feola</i> , 420 U.S. 671 (1975)	26
<i>United States v. Fernandez</i> , 480 F.2d 726 (2d Cir. 1973)	9
<i>United States ex rel. Nelson v. Follette</i> , 430 F.2d 1055 (2d Cir. 1970), cert. denied, 401 U.S. 917 (1971)	9
<i>United States v. Gori</i> , 282 F.2d 43 (2d Cir. 1960), aff'd, 367 U.S. 364, reh. denied, 368 U.S. 870 (1961)	10

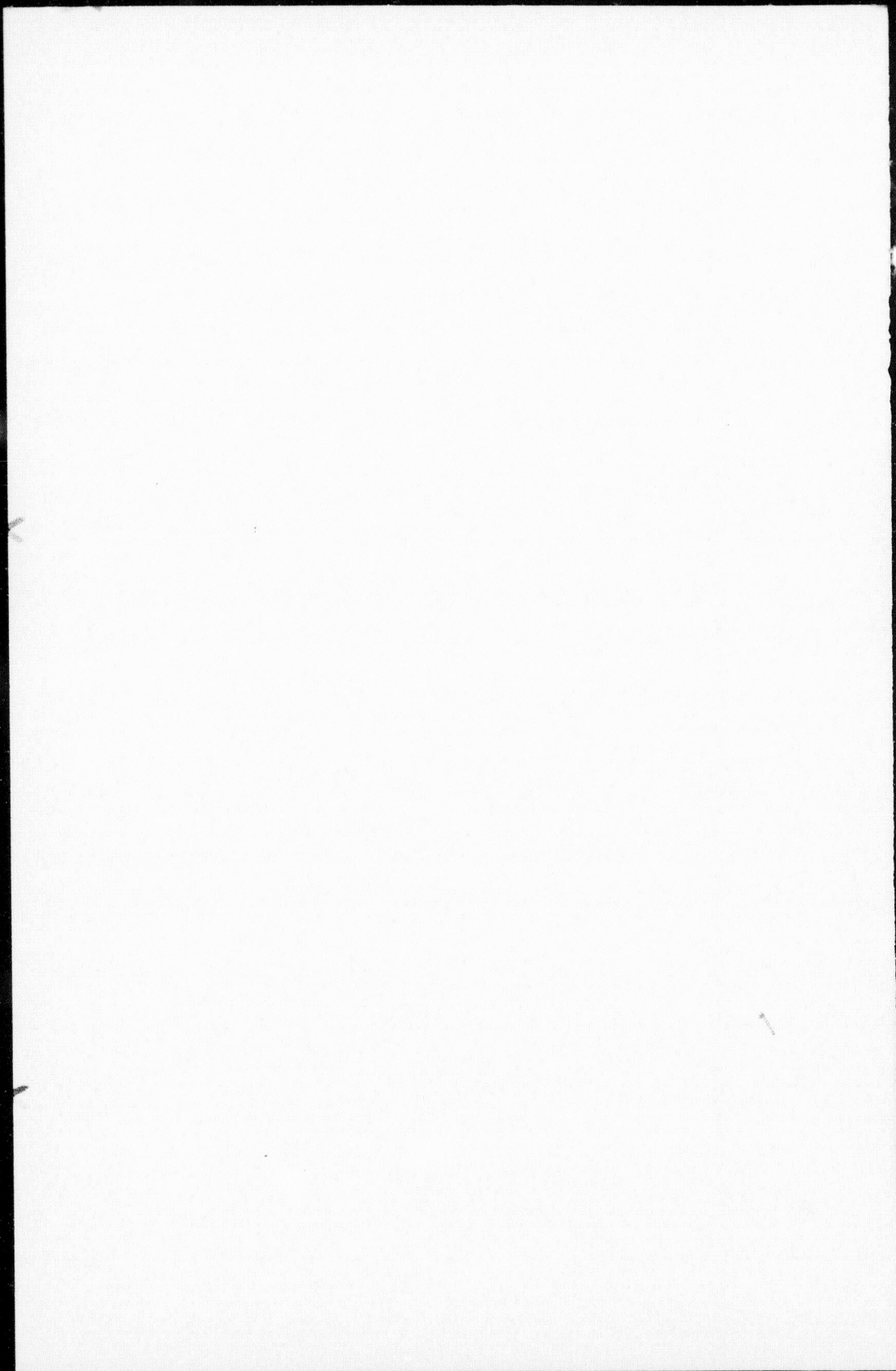
	PAGE
<i>United States v. Green</i> , 523 F.2d 229 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976)	16
<i>United States v. Grunberger</i> , 431 F.2d 1062 (2d Cir. 1970)	9
<i>United States v. Guglielmi</i> , 384 F.2d 602 (2d Cir. 1967)	9
<i>United States v. Harrington</i> , 490 F.2d 487 (2d Cir. 1973)	19
<i>United States v. Harvey</i> , 526 F.2d 529 (2d Cir. 1975), cert. denied, 424 U.S. 956 (1976)	17
<i>United States v. Head</i> , 546 F.2d 6 (2d Cir. 1976), cert. denied, — U.S. — (1977)	11
<i>United States v. Jenkins</i> , 510 F.2d 495 (2d Cir. 1975)	16
<i>United States v. Jennings</i> , 471 F.2d 1310 (2d Cir.), cert. denied, 411 U.S. 935 (1973)	25
<i>United States v. Jermendy</i> , 544 F.2d 640 (2d Cir. 1976)	26
<i>United States v. Johnson</i> , 284 F. Supp. 273 (W.D. Mo. 1968), aff'd, 410 F.2d 38 (8th Cir.), cert. denied, 396 U.S. 822 (1969)	25
<i>United States v. Leibowitz</i> , 420 F.2d 39 (2d Cir. 1969)	19, 21
<i>United States v. Leonard</i> , 524 F.2d 1076 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976)	17
<i>United States v. Licausi</i> , 413 F.2d 1118 (5th Cir. 1969), cert. denied, 396 U.S. 1006 (1970)	26
<i>United States v. Lombardi</i> , 550 F.2d 827 (2d Cir. 1977)	9
<i>United States v. Lomberdozzi</i> , 335 F.2d 414 (2d Cir.), cert. denied, 379 U.S. 914 (1964)	26

	PAGE
<i>United States v. Marchisio</i> , 344 F.2d 653 (2d Cir. 1965)	25
<i>United States v. Marzano</i> , 149 F.2d 923 (2d Cir. 1945)	11
<i>United States v. Mauro</i> , 501 F.2d 45 (2d Cir.), <i>cert. denied</i> , 419 U.S. 969 (1974)	26
<i>United States v. McCarthy</i> , 473 F.2d 300 (2d Cir. 1972)	10
<i>United States v. McCue</i> , 301 F.2d 452 (2d Cir.), <i>cert. denied</i> , 370 U.S. 939 (1962)	25
<i>United States v. Nazzaro</i> , 472 F.2d 302 (2d Cir. 1973)	9
<i>United States v. Reed</i> , 526 F.2d 740 (2d Cir. 1975), <i>cert. denied</i> , 424 U.S. 956 (1976)	9
<i>United States v. Pacelli</i> , 521 F.2d 135 (2d Cir. 1975), <i>cert. denied</i> , 424 U.S. 911 (1976)	16
<i>United States v. Panebianco</i> , 543 F.2d 447 (2d Cir. 1976), <i>cert. denied</i> , — U.S. — (1977)	17
<i>United States v. Payton</i> , 363 F.2d 996 (2d Cir.), <i>cert. denied</i> , 385 U.S. 993 (1966)	21
<i>United States v. Pellegrino</i> , 470 F.2d 1205 (2d Cir. 1972), <i>cert. denied</i> , 411 U.S. 918 (1973)	12
<i>United States v. Persico</i> , 305 F.2d 534 (2d Cir. 1962)	9
<i>United States v. Ramirez</i> , 482 F.2d 807 (2d Cir.), <i>cert. denied</i> , 414 U.S. 1070 (1973)	19
<i>United States v. Rosenwasser</i> , 550 F.2d 806 (2d Cir. 1977)	16-17
<i>United States v. Roundtree</i> , 527 F.2d 16 (8th Cir. 1975), <i>cert. denied</i> , 424 U.S. 923 (1976)	26

	PAGE
<i>United States v. Sclafani</i> , 487 F.2d 245 (2d Cir.), cert. denied, 414 U.S. 1023 (1973)	10, 11
<i>United States v. Taylor</i> , Dkt. No. 76-1210, slip op. 2805, 2821 (2d Cir., April 14, 1977)	16
<i>United States v. Umans</i> , 368 F.2d 725 (2d Cir. 1966)	19
<i>United States v. Viruet</i> , 539 F.2d 295 (2d Cir. 1976)	26
<i>United States v. Weiss</i> , 491 F.2d 460 (2d Cir.), cert. denied, 419 U.S. 833 (1974)	10, 11
<i>United States v. Woods</i> , 252 F.2d 334 (2d Cir. 1958)	9

STATUTES AND AUTHORITIES CITED

18 U.S.C. § 111	25
18 U.S.C. § 201(b)(1)	25
18 U.S.C. § 641	26
Federal Rules of Evidence, Rule 403	17
2 Wigmore, <i>Evidence</i> (3d ed. 1940)	15
2 Wigmore, <i>Evidence</i> (1972 Supp.)	15



**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1205

UNITED STATES OF AMERICA,

Appellee,

—v.—

MARK FREDERICK BUTHORN, JR.,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Mark Frederick Buthorn, Jr. appeals from a judgment of conviction entered on March 16, 1977, in the United States District Court for the Southern District of New York, after an eight-day trial before the Honorable Charles L. Brieant, United States District Judge, and a jury.

Indictment S76 Cr. 600 charged Buthorn in 26 counts with making false statements to the Department of Health, Education and Welfare in connection with claims for Medicaid services in violation of Title 18, United States Code, Section 1001.*

* Indictment S76 Cr. 600 originally consisted of 56 counts—28 charging false claims and 28 charging false statements. At an earlier trial held in July 1976 before the Honorable Marvin

[Footnote continued on following page]

The trial commenced on January 24, 1977. On February 2, 1977, the jury found Buthorn guilty as charged on all 22 counts submitted to it. On March 16, 1977, Judge Brieant sentenced Buthorn to four years imprisonment on each of the 22 counts, to run concurrently with each other. Buthorn remains free on his own recognizance pending this appeal.

Statement of Facts

The Government's Case

A. Synopsis

In 1971 and early 1972, Mark Frederick Buthorn, Jr., a podiatrist, worked at a Bronx clinic which specialized in Medicaid. As patients came into the clinic, many bringing their children simply because they could not afford a babysitter, the entire family would often be directed by the receptionist to see the doctors. Buthorn saw most of these patients only once. Several patients that Buthorn did not see at all were actually seen by another podiatrist, Dr. Shure. However, Buthorn billed the Medicaid Program for treating them several times each, charging for an imaginative gamut of foot problems including injections as well as the padding and strapping of the feet.

E. Frankel, the Government elected to proceed on the false statement counts and the identical false claim counts were dismissed. The jury was unable to agree on 26 counts, after acquitting on two counts, and a mistrial was declared. The case was reassigned to Judge Brieant for re-trial on 26 counts. Prior to submission to the jury, 4 additional counts were dismissed with the consent of the Government. Accordingly, 22 counts went to the jury.

(a) Dr. Buthorn's Services

Mark Frederick Buthorn, Jr., is a podiatrist licensed by the State of New York (GX 48A)* and certified by New York City as a Medicaid provider. (GX 47, 48). In 1971 and 1972, he practiced, among other places, at a clinic located at 567 East 149th Street in the Bronx, a clinic which was known to the patients who utilized its services by various names, including Centro Medico, St. Ann's, St. Mary's and HIN. (Tr. 666-67). That clinic's clientele primarily consisted of Medicaid recipients.

Buthorn prepared and submitted all of the Invoices included in the indictment (GX 1-28, 48) for the patients, each of whom were eligible for Aid to Dependant Children ("ADC") coverage. (Tr. 29, 35). He was paid for each of his claims. (GX 49-49T).

Each of the patients called by the Government testified about the treatment she actually received, which testimony was in direct contradiction to what Buthorn had claimed he had rendered.** The testimony of three of Buthorn's patients is demonstrative of that contradiction.***

Sonia Camacho (six children), who had been to a foot doctor once in her entire life (Tr. 202-03), went to the clinic to see a medical doctor and was asked by the

* Citations to "GX" refer to Government's Exhibits; "DX" refers to Defendant's Exhibits; "Tr." refers to pages in the transcript.

** Each patient was on public assistance and in 1971 had the number of children shown in parenthesis after her name. None of them ever lent her Medicaid Card, and the only instances of lost cards occurred at times not relevant to the times at issue. (Tr. 138, 277, 311, 481, 530, 587). Each card is reissued monthly. (Tr. 19). Many patients testified that the clinic receptionist would have the Medicaid Card photo copied (Tr. 789) and that on the first visit they were asked for the name and years of birth of all of the children listed. (Tr. 276, 315).

*** Buthorn does not challenge the sufficiency of the evidence.

receptionist if she wanted to see a foot doctor. She saw Buthorn once when he cut an ingrown toenail and took an X-ray of her foot. (Tr. 140, 148). Buthorn billed for four visits (GX 1, 1A, 1B and 2),* one of which included an injection of depo-medral ** in her foot (Tr. 149).

Robert Diaz is the son of Minerva Diaz, who was on Medicaid in 1972. However, Robert was 19 in 1972 and no longer eligible to be included under his mother's coverage.*** (Tr. 209-10). Just prior to the completion of high school in 1972 (Tr. 230), he went to Centro Medico for a routine physical which was given by an oriental woman medical doctor. Two weeks later he returned for the results of the physical, which were given to him by a Hindu doctor. (Tr. 212-13). Diaz never saw Buthorn. (Tr. 215, 227-28). Diaz did not use his mother's Medicaid Card but instead paid \$30.00 cash for his examination. (Tr. 216). Buthorn billed Medicaid for a foot examination, the results of which were "unremarkable". (GX 2). The only time Diaz had ever seen a foot

* The full-numbered exhibits are invoices which relate to counts in the indictment. Exhibit numbers with letter suffixes denote other billings relating to the same patient. Some of these invoices denote actual visits (e.g., in Comacho's case, GX 1A). The evidence showed, however, that Buthorn would in many cases submit at least one false invoice which pre-dated the actual visit.

** The definitions of the technical terms were stipulated. (GX 46). Dr. Paul E. Hershey was qualified as an expert witness in the field of podiatry (Tr. 237-41), and explained and demonstrated the various procedures that are found in the claims submitted by Buthorn: Injections (Tr. 241-52); ingrown toenails (Tr. 252); strapping and padding (Tr. 253-256); and the meaning and treatment of "onychausis" and "onychogryphosis", "onychia" and "paronychia" (Tr. 256-59).

*** Diaz had previously gone to the clinic with his mother (Tr. 219-20) when he was still eligible for Medicaid.

doctor was at another clinic at which time he was operated upon. (Tr. 233-35).*

Willie Mae Fogg (four children) went to the clinic for a cold. Since she could not get a babysitter, she brought her four children, ages 3-13, with her to the clinic. None was ill. The nurse took her card and made a copy of it and asked for the names of her children. (Tr. 276-77). Although Fogg did not ask to see one, the nurse took her to see a foot doctor. (Tr. 273, 290). The foot doctor saw her and her children but did nothing to any of them except to give Fogg a box of foot powder for one child's feet. (Tr. 281-82). No bandages, straps, tape, or pads were placed on anyone's feet. Neither she nor her children ever saw a foot doctor other than on that one occasion. (Tr. 283). Buthorn billed for two visits (GX 4, 6) and for strapping** one child's feet on both occasions and for treating two children for "tinea pedis" or athletes foot. (GX 46).

The Defense Case

Nilza Williams, the office manager of Centro Medico during 1971 (Tr. 647), described the procedure at the clinic. She explained the clinic daybook, in which a record is kept of each patient's visit and the doctor visited (Tr. 656-657; DX AE). She flatly denied ever telling pa-

* Evidence was admitted on rebuttal that Diaz was operated on three months later at Prospect Hospital for bi-lateral hammer toes, a condition that by its very nature is easily discovered and which takes a period far in excess of three months to develop. (Tr. 233).

** "Strapping" is the use of strips of adhesive plaster to immobilize or to support the foot; "padding" is sometimes also done in conjunction with strapping by means of adhesive felt or foam rubber to either support or remove pressure from a painful area of the foot (Tr. 253).

tients that they had to see a doctor, or that Buthorn had ever told her to steer people to him or to place anyone's name in the daybook that had not been seen. (Tr. 658). However, on cross-examination, Williams admitted that half of her time was spent developing X-rays and half spent translating for the doctors (Tr. 671), and that she did not see every patient that came in. She knew none of the patients who had testified for the Government (Tr. 672-73), and was unable to state whether the daybook was accurate, since different employees and doctors would make entries in it, and sometimes no entries would be made at all. (Tr. 673-75).

Mark Buthorn, the defendant, also testified. Buthorn denied ever directly soliciting patients at the clinic (Tr. 690), and implied that he had no way of being sure of the real identity of a Medicaid recipient. (Tr. 695).

Buthorn offered into evidence the pink carbon copies of the original invoices previously submitted by the Government (GX 1-28) and testified that he had performed every service for each of the patients who testified. These invoices, along with the clinic's daybook * and some patients' charts, on which entries were made contemporaneously with the making of the invoices, were offered in corroboration of that testimony. (Tr. 698-848).

Buthorn claimed that in addition to the clinic records, he kept his own records on each of his patients for the first few months he worked at HIN (February to May

* The daybook (DX AE) was of doubtful corroboration since it only contained checkmarks. Buthorn's name did not appear—only a podiatrist column. There were two other podiatrists at the clinic, including Dr. Shure. (Tr 781-83; DX AE-1). On cross-examination, Buthorn admitted there was nothing in the book that linked him with the code number 10 upon which he placed his reliance in his previous testimony as to his actual performance of the services billed for. (Tr. 855-56).

1971), accumulating several hundred cards. (Tr. 858-62). However, during the summer of 1975 he destroyed the cards because he did not need them anymore. (Tr. 862-63). Buthorn admitted that there was nothing on the destroyed cards substantially different from the invoices (Tr. 935) and pointed out that when he destroyed the records he had not been indicted or even accused of anything. (Tr. 936). On re-cross, in an attempt to learn why Buthorn would destroy patient records which were needed as documentation, Buthorn at first denied ever having any difficulty with documenting his treatments for the Medicaid Program, but then admitted he had had to repay \$8,000 to that program because of a civil dispute. (Tr. 937, 943). Still later, after refreshing his recollection, Buthorn admitted he had written letters in December 14, 1972 (to Senator Buckley), and April 23, 1973, in which he contended he had properly documented his treatments. (Tr. 943-48).

Buthorn explained in some detail the manner in which he examined Robert Diaz's foot (Tr. 888)* and stated unequivocally that if a person had bilateral bunions on his fifth toes (or on the outsides of his feet) to the point where they hurt him when he walked, he would have discovered it upon an examination of that person's feet. (Tr. 891). Buthorn also testified that, other than by traumatic causes, hammertoes evolve over a long period of time. (Tr. 893-95).

The Government's Rebuttal

The records of Prospect Hospital for Robert Diaz revealed that on September 14, 1972, he was seen by Dr. S. Marne and complained of bunions on the fifth toes of both

* He had allegedly examined Diaz on May 23, 1972 and found his condition "unremarkable" (GX 3).

feet that were getting bigger and caused great pain, especially when walking. The doctor diagnosed bi-lateral hammertoes. (GX 51). Diaz was operated on for bi-lateral hammertoes on September 29, 1972, approximately four months after Buthorn found his feet "unremarkable". (GX 3). Buthorn, on surrebuttal, contended that Dr. Marne's diagnosis was internally inconsistent as well as inconsistent with his own lack of findings (Tr. 1023-24) and disputed the medical necessity of the operation. (Tr. 1026).

Judge Hixon,* aged 73, saw Buthorn monthly during 1974 and 1975 at a clinic in Queens. His testimony was identical with that of Buthorn's other patients, who denied receiving the care for which Buthorn billed. (Tr. 990-99).

A R G U M E N T

P O I N T I

The Trial Judge's Conduct Did Not Deprive Buthorn of a Fair Trial.

Buthorn contends that remarks by Judge Briant during the course of the trial deprived him of a fair trial. As we shall demonstrate, some of the remarks upon which Buthorn places his greatest emphasis were made outside the presence of the jury. The remaining remarks—many of which were in direct response to conduct of defense counsel—were well within the trial judge's broad discretion and, particularly in the context of a careful instruction to the jury to disregard any remarks made by the judge, simply did not prejudice Buthorn. In short, his argument is meritless.

* Mr. Hixon was not a judicial officer; his first name is Judge.

It is well settled law that a trial judge has plenary control over the conduct of the trial and all proceedings in the courtroom. See *Geders v. United States*, 425 U.S. 80, 86-87 (1976), and cases cited therein; *United States ex rel. Nelson v. Follette*, 430 F.2d 1055, 1059 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971). Indeed, a trial judge may comment on the evidence before the jury, provided that the jury is properly instructed that it is they, and not the judge, who are responsible for resolving all factual issues. *United States v. Lombardi*, 550 F.2d 827, 829 (2d Cir. 1977), and cases cited therein; *Quercia v. United States*, 289 U.S. 466 (1933). A trial judge's exercise of this control will be reviewed only for a determination of whether he abused his discretion. *Geders v. United States*, *supra*, 425 U.S. at 86; *United States v. Reed*, 526 F.2d 740, 743 (2d Cir. 1975), *cert. denied*, 424 U.S. 956 (1976).

This Court has been compelled to reverse convictions because of an abuse of discretion in two principal—and rare—circumstances. In certain cases, the trial judge's comments on his view of the evidence, or on the guilt of the accused, exceeded the broad limits recognized in *Quercia v. United States*, *supra*, or was not counterbalanced by a limiting instruction. See *e.g.*, *United States v. Persico*, 305 F.2d 534 (2d Cir. 1962); *United States v. Brandt*, 196 F.2d 653 (2d Cir. 1952); *United States v. Woods*, 252 F.2d 334 (2d Cir. 1958); *United States v. Grunberger*, 431 F.2d 1062 (2d Cir. 1970). In other cases, the trial judge has, by his conduct before the jury, indicated his view of where the truth lay and thus deprived the defendant of a fair trial. See *e.g.*, *United States v. Fernandez*, 480 F.2d 726, 736-738 (2d Cir. 1973); *United States v. Brandt*, *supra*; *United States v. Gugliemi*, 384 F.2d 602, 605 (2d Cir. 1967); *United States v. DeSisto*, 339 F.2d 833, 834 (2d Cir. 1961); *United States v. Nazzaro*, 472 F.2d 302, 307 (2d Cir. 1973).

The events of which Buthorn complains, considered separately or in the aggregate, simply do not come close to reaching the standards delineated in these cases. First, several of the remarks about which he complains were not made in the presence of the jury, and thus could not have affected the trial. See e.g., Tr. 181-85, cited at Brief at 7. See also Tr. 358-59. *United States v. Weiss*, 491 F.2d 460, 468 (2d Cir.), *cert. denied*, 419 U.S. 833 (1974); *United States v. Sclafani*, 487 F.2d 245, 256 (2d Cir.), *cert. denied*, 414 U.S. 1023 (1973), and cases cited therein.

Second, many of the remarks were made in direct response to improper objections, speeches, or conduct of defense counsel (Tr. 345-46; 448-51; see also 364-65; 445; 452; 494-97; 559; 578-79), or in an effort to avoid having the trial become bogged down in detail (Tr. 44-47) or in repetitious questions. (Tr. 189, 362, 370-71, 404, 448-49, 454, 455-56, 562). The power of the trial court to respond to conduct of defense lawyers is clear. *United States v. McCarthy*, 473 F.2d 300, 307 (2d Cir. 1972); *United States v. Weiss*, 491 F.2d 460, 468 (2d Cir. 1974); *United States v. Sclafani*, *supra*, 487 F.2d at 256.

It is equally clear that the judge has the discretion to "exert substantial control over the proceedings," *Geders v. United States*, *supra*, 425 U.S. at 87, and is "more than a mere automaton or referee." *United States v. Gori*, 282 F.2d 43, 47 (2d Cir. 1960), *aff'd*, 367 U.S. 364, *reh. denied*, 368 U.S. 870 (1961).** Judge Brieant's remarks, particularly when the record is viewed as a

* Citations to "Brief" and "Br." refer to Appellant's Brief.

** As this Court put it, in rejecting arguments similar to those made here (also with respect to Judge Brieant), "[t]he trial court does indeed have the right to 'spear a red herring' . . ." *United States v. Cheung Kin Ping*, Dkt. No. 76-1362, slip op. 2063, 2069 (2d Cir., Feb. 28, 1977).

whole, *United States v. Weiss*, *supra*, clearly demonstrate that he was merely filling this role.

Third, the challenged remarks simply do not rise to the level of those few cases where this Court has reversed a conviction for abuse of discretion, or even to that of numerous cases as to which the Court has affirmed convictions where the trial court's conduct was substantially more questionable than here. See, e.g., *United States v. Boatner*, 478 F.2d 737 (2d Cir.), *cert. denied*, 414 U.S. 848 (1973); *United States v. Sclafani*, *supra*; *United States v. Head*, 546 F.2d 6 (2d Cir. 1976), *cert. denied*, — U.S. — (1977); *United States v. Weiss*, *supra*. While Judge Brieant may have used pungent language on occasion, "the record further reveals that, while the judge from time to time took defense counsel to task, he did not hesitate likewise to express disapproval of some of the prosecutor's tactics and to sustain numerous defense objections. On the whole, therefore, the trial judge, while openly displaying displeasure on some occasions, was relatively evenhanded." *United States v. Weiss*, 491 F.2d 460, 469 (2d Cir. 1974).^{*} In short, Judge Brieant did not "usurp the function either of the jury or of the representatives of the parties," *United States v. De Sisto*, 289 F.2d 833, 834 (2d Cir. 1961), or indicate in any way that he had "enter[ed] the lists." *United States v. Marzano*, 149 F.2d 923, 926 (2d Cir. 1945) (L. Hand, J.).

Finally, of course, Judge Brieant provided the jury with a detailed instruction on this very point, which is

^{*} For instances where the prosecutor was exposed to the same language as defense counsel, see Tr. 29, 39-40, 465-66, 908. Not only did Judge Brieant sustain proper defense objections (Tr. 202, 216-217, 235-236, 280, 295, 298, 314, 383), but he also instructed both counsel to simplify their questions for the benefit of the non-English speaking witnesses (Tr. 383) and ruled in favor of objections not even voiced by Buthorn (Tr 711).

reproduced in the margin.* Such an instruction, which was noteworthy for its completeness and candor, obviously dispelled any possible prejudice Buthorn may have suffered. *United States v. Boatner, supra*, 478 F.2d at 741; *United States v. Pellegrino*, 470 F.2d 1205, 1207-08 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973); *United States v. D'Anna*, 450 F.2d 1201, 1206-1207 (2d Cir. 1971).

POINT II

The Trial Court Properly Admitted Evidence of a Subsequent Civil Dispute.

Buthorn claims that Judge Briant improperly allowed the prosecutor, during re-cross examination of the defendant, to inquire into a civil dispute concerning Buthorn's documentation procedures. In particular, Buthorn claims that this testimony unfairly confused and prejudiced the jury against him. This claim is meritless.

*"Please put out of your mind any exchanges which may have occurred during the trial between the lawyers, or between any attorney and the Court. It is not my function to favor one side or the other, or to indicate to you, the jury, in any way that I have any opinion as to the credibility or truthfulness of any witness, or as to the guilt or innocence of the defendant. That is your function, that is yours alone, and I leave it entirely to you. So please don't assume that I hold any opinion in any matters concerning this case, and please don't reach any conclusion that I may have some attitude or that I may tend to favor one side or the other in the case. I don't.

A trial is not a contest between lawyers. A trial is a search for truth. It is to bring out the evidence and allow the jurors to decide the facts, in accordance with the law.

Please, members of the jury, don't regard me as impatient. I have a number of cases and it is my obligation to get the trial conducted as expeditiously as can be done and still permit a full disclosure of all the evidence and all the contentions to you. And that is what I have been trying to accomplish during the time we have been together here." (Tr. 1175-1176).

Not only was this area of cross-examination well within the District Court's power to allow, but Buthorn himself opened the door to its admission. A review of the facts in their context demonstrates this.

Buthorn testified, on direct examination, that he had kept certain documents that would establish that he had in fact performed the services for which he submitted bills, but had destroyed those records. On cross, the prosecutor asked if he had not previously been penalized by Blue Cross for not keeping records, to which Buthorn answered, "No." At this point Buthorn objected to any reference to difficulties he might have had with the Medicare program concerning his documentation. (Tr. 863-64). The ensuing conference, portions of which are recited by Buthorn (Br. 9-10), occurred out of the presence of the jury. It was in response to the Court's indication that the question had been answered, not that it was irrelevant (Tr. 864), that the colloquy quoted by Buthorn took place.

While Judge Brieant initially indicated that the mere magnitude of the dispute with Medicare might imply to the jury a criminal act on the part of Buthorn (Tr. 866, 867), further argument by both counsel convinced him otherwise:

THE COURT: I suppose it is possible to have that kind of a problem in that magnitude without having any criminal violation.

MR. GRUNEWALD [Defense Counsel]: There is no question that it was not criminal.

THE COURT: If what you say is right, then it is a proper field for cross-examination as to the validity of his record keeping. (Tr. 869).

The Court later specifically stated "I will not permit cross-examination as to his \$8,000 dispute with Medicare,

which he has already denied under oath." (Tr. 884-885). In fact, counsel for appellant assured himself, prior to the resumption of cross-examination, that this evidence would not be permitted:

MR. GRUNEWALD: You are not taking it?

THE COURT: No; I am not.

MR. GRUNEWALD: Thank you, sir. (Tr. 887).

Despite this discussion, counsel for Buthorn returned to the subject on redirect examination, the entirety of which is quoted in his Brief at 11-13. As that record shows, Buthorn was not content to allow sleeping dogs to lie, but rather entered into the issue of his disposition of the records and his reasons for doing so. In particular, his attorney elicited from him the fact that at the time when he destroyed the records he was not under indictment or "even accused of the charges in this indictment." (Tr. 936). Thereafter, and expressly because Buthorn had opened the door to the matter, Judge Brieant revised his earlier judgment and allowed inquiry into the matter of Buthorn's dispute with Blue Cross in 1973, concerning his lack of records for prior years. That inquiry demonstrated that Buthorn had been, in effect, reprimanded by Blue Cross for not keeping proper records, and as a result in 1973 had been assessed \$8,000. (Tr. 936-49). Judge Brieant made it clear to the jury that the controversy involved only a civil controversy * and then gave

* Mr. Grunewald: I object to this whole line of inquiry.

The Court: I will overrule the objection, but I will insist that the question be phrased in terms of a civil dispute, so there will be no question in the jury's mind—

Mr. Wilson: I will concede that.

The Court: There is no suggestion of criminality here.

Mr. Wilson: Absolutely none. It was a civil dispute between Dr. Buthorn and Blue Cross. (Tr. 942)

an unusually complete and thorough cautionary instruction to the jury.*

Under these circumstances, the trial judge's decision was plainly correct. Buthorn does not even dispute the hornbook notion that destruction of possible evidence is of considerable relevance in demonstrating consciousness of guilt. 2 Wigmore, *Evidence* § 278, at 124 (3d ed. 1940); see also *id.* at 42 (1972 supp.). Thus, Buthorn's destruction of records during 1975, and his explanation for doing so, was of great significance during the trial. This was particularly clear when Buthorn himself raised the issue of the existence of these records; the circumstances of their destruction was thus certainly probative of his credibility. For these reasons, the trial judge would have been fully justified in allowing inquiry into the matter during initial cross-examination. Indeed, his remarks at that time indicate that he recognized the relevance of the line of inquiry but decided to preclude the questions only out of an excess of caution. When, however, Buthorn himself delved into the very area where

* The Court: . . . I will tell you members of the jury right now that this line of questioning is neither intended to nor may it be considered by you as creating any aura. We don't decide criminal cases in accordance with any aura. Cases must be decided on the issue of whether guilt as to a particular count is proved to the satisfaction of all twelve jurors beyond a reasonable doubt.

This concerns every element of the alleged crime, all of which I will explain to you in much greater detail at the close of the trial.

This particular line of inquiry is being permitted for a very limited purpose only, and that is to assist the jurors in considering the credibility of this witness as to his testimony that he threw out or destroyed cards or records in the Hin Clinic for services rendered in 1971. That is all. You must not assume that he did anything wrong or fraudulent or otherwise unlawful in connection with his dispute in Blue Cross. (Tr. 945-46)

he had successfully opposed inquiry, he clearly opened the door to the subsequent inquiry. The purpose of this inquiry was to show that Buthorn's innocent explanation for destroying records was improbable, since he had already lost a considerable amount of money from doing so earlier.*

It is a legal commonplace that the extent and scope of cross-examination is left to the sound discretion of the trial judge, and is subject to review only for an abuse of discretion. *United States v. Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975); *United States v. Green*, 523 F.2d 229, 237 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); *United States v. Pacelli*, 521 F.2d 135, 137 (2d Cir. 1975), *cert. denied*, 424 U.S. 911. (1976). It is also clear that evidence or inquiry on cross-examination that might not be permissible in the first instance may become so when the defendant "opens the door." *United States v. Taylor*, Dkt. No. 76-1210, slip op. 2805, 2821 (2d Cir., April 14, 1977), and cases there cited; *United States v. Caniff*, 521 F.2d 565, 570 (2d Cir. 1975), *cert. denied sub nom. Benigno v. United States*, 423 U.S. 1059 (1976). Particularly given the care with which Judge Brieant approached the question—essentially trying his best to avoid the problem until the defendant needlessly raised it again—and in the context of the extensive cautionary instruction, *United States v. Rosenwasser*, 550

* The relevance of Buthorn's prior experience with Blue Cross was self-evident. During his testimony, and again during re-direct, he claimed that he destroyed the records simply as a matter of house-cleaning. As the prosecutor put it,

"He had a great deal of trouble with Medicare to the extent of paying back eight thousand dollars. Now after being burned for eight thousand dollars in 1973, destroying records in 1975 would be the last thing a reasonable man would do, and this goes directly to his credibility." (Tr. 865).

F.2d 806, 809 (2d Cir. 1977), he clearly did not abuse his discretion.*

POINT III

Neither Of The Two Grand Juries That Returned The Superseded And The Superseding Indictments Was Misled As To The Nature Of The Testimony They Received.

Certain evidence pertaining to this case was initially presented to the December 1975 Additional Grand Jury on January 29, 1976, in connection with a larger investigation. Indictment 76 Cr. 600 was returned at that time. On June 25, 1976, the June 1976 Regular Grand Jury heard further evidence concerning this case, and the transcript of the prior testimony was made available to the jurors at that time. Indictment S76 Cr. 600 was subsequently filed.

The transcripts of the testimony pertaining to Buthorn from the deliberations of the December 1975 Additional Grand Jury and the testimony presented to the June 1976 Regular Grand Jury were marked as Court

* Buthorn's claim that, under F.R. Evid. 403, the evidence should have been excluded because of its propensity for prejudice, is misplaced. Rule 403 provides that relevant evidence "may" be excluded "if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusing of issues, or misleading the jury. . . ." (Emphasis added). This Court has made it clear that such a determination is primarily for the trial judge, who has a "feel" for the issue "that an appellate court, working from a written record, simply cannot obtain." *United States v. Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); see also *United States v. Corr*, 543 F.2d 1042, 1051 (2d Cir. 1976); *United States v. Panebianco*, 543 F.2d 447, 454 (2d Cir. 1976), *cert. denied*, — U.S. — (1977); *United States v. Harvey*, 526 F.2d 529 (2d Cir. 1975), *cert. denied*, 424 U.S. 956 (1976).

Exhibits 3 and 4 at trial.* No statement appears in these transcripts with respect to the fact that some of the evidence presented was of a hearsay nature. However, as Buthorn concedes, the affidavit of Assistant United States Attorney JoAnn Harris, appended to the appellant's brief, establishes that both grand juries in question had been informed at the time of their impaneling of the nature of hearsay testimony and their right to require direct testimony. The Assistant United States Attorney trying the case did not recall if he had repeated that information off-the-record. (Tr. 640). Therefore, it is clear that the two Grand Juries involved knew what hearsay testimony was—they simply did not have a formalized definition repeated to them a second time. *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972), upon which Buthorn relies, does not require more.

In *Estepa*, a narcotics case, the sole witness before the Grand Jury was a New York City Police Officer. Although there were other officers as well as narcotics agents who were more familiar with the facts of the case, Officer Twohill, the officer *least* familiar with the case, testified before the Grand Jury that indicted *Estepa*. This Court noted that despite his limited knowledge, Officer Twohill testified "at length and in detail". 471 F.2d at 1134.

The Second Circuit reversed the conviction with an instruction that the Indictment be dismissed. The basis for this decision was *not* that the Government failed to produce witnesses with the most intimate knowledge, but that Officer Twohill's testimony gave the erroneous impression that he had firsthand knowledge:

"The grand jury must not be misled into thinking it is getting eyewitness testimony from the agent

* Copies of these Court Exhibits are included in the record on appeal.

whereas it is actually being given an account whose hearsay nature is concealed . . . ' *United States v. Leibowitz*, 420 F.2d 39, 42 (2d Cir. 1969)." 471 F.2d at 1138.

That was clearly not the case here.

In *United States v. Umans*, 368 F.2d 725 (2d Cir. 1966), this Court noted that the use of hearsay evidence was clearly permissible to avoid demonstrable inconvenience in summoning witnesses with direct knowledge. The witnesses with direct evidence here were the medicaid recipients, alleged patients of Dr. Buthorn, who numbered in excess of ten, and many of whom spoke no English. The inconvenience avoided by the use of hearsay testimony is obvious.

Moreover, this Court has expressly held that the use of hearsay testimony is not prohibited *per se*, but that the Grand Jury simply must not be deceived into believing that it is getting first-hand testimony when it is not. *United States v. Harrington*, 490 F.2d 487 (2d Cir. 1973); *United States v. Ramirez*, 482 F.2d 807, 812 (2d Cir.), *cert. denied*, 414 U.S. 1070 (1973). In *United States v. Harrington*, *supra*, this Court stated:

Appellant would have us extract from *Estepa* a requirement that the prosecution has a broad and amorphous duty to apprise the grand jury of the quality of all evidence presented to it. Whatever the scope of such a duty, if indeed a duty exists, there seems to be no substantial ground to challenge the prosecutor's presentation here. . . .

A substantial portion of . . . [agent's] testimony was undoubtedly hearsay, yet the testimony was delivered in such a way that the grand jury could not have been deceived into believing that it was hearing a recitation of the agent's first-hand observations." 490 F.2d at 489-490. (Footnote omitted)

Both Grand Juries involved in this case were aware of the nature of the testimony they received by virtue of the form of both the questions posed and the answers given. For example, on January 29, 1976, Charles Kenher, an employee of HEW assigned to the Office of the United States Attorney to assist in an investigation of Medicaid fraud, indicated at the outset of his testimony that his knowledge was based on what others had told him:

Q. Were these recipients [sic] all interviewed, the ones that are listed on the invoices?

A. Yes, they were interviewed by myself or members of this staff.

* * * * *

(1/29/76 G.J. Tr. 3)*

The entire seven and one-half pages of Mr. Kenher's testimony before the December 1975 Additional Grand Jury on January 29, 1976 then details the claims of each of nine recipients with respect to the services allegedly performed for them by Dr. Buthorn. Each of the recipients' claims were stated in such a manner as to make it clear that the testimony of Mr. Kenher was hearsay.

On June 25, 1976, the case was presented again to the June 1976 Regular Grand Jury. At this time Mr. Kenher again testified, his prior testimony being marked as a Grand Jury Exhibit.** At the end of that testimony

* References to the transcript of the testimony before the Grand Jury which returned Indictment 76 Cr. 600 will be referred to as "1/29/76 G.J. Tr." while the transcript of the Grand Jury which returned Indictment S76 Cr. 600 will be referred to as "6/25/76 G.J. Tr."

** This procedure has been upheld as a valid means of avoiding a repetition of prior testimony. *United States v. Bertolotti*, 529 F.2d 149, 159 (2d Cir. 1975). See generally, *United States v. Chanen*, 549 F.2d 1306 (9th Cir. 1977).

(largely concerning the connection between the New York City Medicaid Program and the Federal Government) the following testimony appears:

Q. Were patients which he [Dr. Buthorn] treated interviewed?

A. Yes, they were.

Q. Now, not all these patients were interviewed by you, but by other persons?

A. Not me, not by me personally, but by members of the staff, yes. (6/25/76 G.J. Tr. 7)

Ms. Rena Morey, an investigator with HEW, also testified before the June 1976 Regular Grand Jury. Ms. Morey's testimony made it clear that she was in large part repeating what the Medicaid recipients who later testified at trial had told her.

Accordingly, both Grand Juries were made aware of "the shoddy merchandise they . . . [were] getting so they . . . [could] seek something better if they wish[ed]." *United States v. Payton*, 363 F.2d 996 at 1000 (2d Cir.) (dissenting opinion), *cert. denied*, 385 U.S. 993 (1966). There has thus been no showing, and on the facts of this case there could be none, that a high probability exists that direct evidence would have caused either grand jury to fail to indict. *United States v. Leibowitz*, *supra*, 420 F.2d at 42. Therefore, both Indictment 76 Cr. 600 and Indictment S76 Cr. 600 were returned on the basis of proper testimony and were valid.

POINT IV

The False Statements Made By Buthorn Were Made in a Matter within the Jurisdiction of a Federal Department or Agency.

Buthorn argues that there is no federal jurisdiction in this matter for two reasons:

- a) The administration of the federal funds paid into the Medicaid program in New York State and New York City results in forms which do not refer to the United States government but only to the City of New York and, therefore,
- b) Buthorn was never informed that the payments came from (and his statements were sent to) the federal government.

Thus, Buthorn does not claim that there is no significant relationship between the federal agency and the "party to whom the false statement was submitted". Rather, his real objection appears to be that no evidence of that relationship appeared on the documents that he signed and that were eventually submitted to the Department of Health, Education and Welfare ("HEW").

This issue was, as Buthorn concedes, reviewed in *United States v. Candella*, 487 F.2d 1223 (2d Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). In *Candella*, this court held that:

"... a violation of § 1001 does not require that the false statement must actually have been submitted to a department or agency of the United States, but rather that the statement was to be utilized in a matter which was within the jurisdiction of such department or agency." 487 F.2d at 1227.

Moreover, evidence of the existence and significance of the relationship between HEW and the Medicaid Pro-

gram operated by the City of New York was indisputably demonstrated at trial.

Officials of the New York City and New York State Social Services Departments, including a computer programmer, testified with respect to the operations of their agencies. That testimony described the Medicaid program and described in detail the trail that the invoices signed by Buthorn took from the New York City Department of Social Services to HEW in Washington, D.C.

Title 19 of the Social Security Act (the Medicaid Act) provides for federal assistance to certain categories of people needing medical aid. (Tr. 63). The primary category consists of families with dependent children (referred to as Aid To Dependent Children or "ADC") (Tr. 58, 101-2). Eligible recipients are issued a Medicaid card which bears certain basic family information as well as a number (Tr. 18-19). Practitioners in the health field who are eligible to render Medicaid services are called "Providers" (Tr. 18) and are registered and assigned a number which must appear on each claim for payment which they submit. The claim is in the form of an Invoice for Doctors Services ("invoice") which bears an identification of the patient, the provider, the diagnosis, treatment given and the amount claimed (GX 1-29). Each invoice also bears the following certification which must be signed by the provider: "I hereby certify that the services charged for below were furnished by me to the recipient(s) listed and that no part of this invoice has been previously paid."

Invoices are submitted to the Division of Medical Payments of the New York City Department of Social Services at its offices in Manhattan where they are processed for computer programming. (Tr. 15, 17-18).*

* The computer checks the eligibility of both patient and provider, the type of treatment rendered and the price claimed. The computer is also programmed to identify federally participating Medicaid claims. (Tr. 18, 126-128).

Thereafter, the computer generates a bi-weekly payment statement for each practitioner or "provider" summarizing the information shown on the invoices and producing a check for the total amount of accepted invoices. (Tr. 19, 125; GX 49-49T). From here the invoices next formed the basis for required monthly reports (GX 29-38A) by New York City to the New York State Department of Social Services which administers the state's Medicaid program. (Tr. 99, 102). These reports include the totals of all payments to all providers and constitute the city's claims for reimbursement of the portion of the cost of medical assistance furnished by the state and federal governments and include amounts spent for federally participating medical assistance programs. (Tr. 60-2, 94).^{*} Finally, every three months, the State submits a report to HEW based on all of the monthly reports from all of the districts in the State. This report serves as a recapitulation for money advanced during the quarter and as an estimate of advances for the future. (Tr. 132-33). By this method, the federal government reimburses the state fifty cents for each dollar spent for federally-participating Medicaid services. (Tr. 57, 101, 107). Thus, the existence and significance of the relationship between HEW and the New York City Department of Social Services with respect to Buthorn's false statements was clearly demonstrated at trial.

Buthorn's argument is that whether or not the federal government was in fact involved, or to what degree, he had to have had knowledge of its involvement. There is no such requirement. Section 1001 of Title 18 of the United States Code does not require that a defendant have knowledge that it is the federal government to which he or she makes the false statement which is submitted.

^{*} These reports are filed pursuant to, *inter alia* regulations of HEW. (Tr. 100, 133-34).

United States v. Adler, 380 F.2d 917 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967); *United States v. Marchisio*, 344 F.2d 653 (2d Cir. 1965); *United States v. McCue*, 301 F.2d 452 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962). The language of the statute refers to knowledge only in connection with the falsity of the statement. The purpose of this statute, as with others, is to protect the federal government from fraud, deceit and lying—crimes which are not so vague that a person must be given special notice and warning. *United States v. Johnson*, 284 F. Supp. 273, 283 (W.D. Mo. 1968), *aff'd*, 410 F.2d 38 (8th Cir.), *cert. denied*, 396 U.S. 822 (1969).

Analogous cases are instructive in their consistent rejection of the contention that knowledge of which sovereign is being victimized bears any relation to guilt. In *United States v. Jennings*, 471 F.2d 1310 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973) the defendant was convicted of offering a bribe to an F.B.I. agent who he thought was a city policeman. This circuit declined to extend the element of 18 U.S.C. § 201(b)(1)* to prove that "a defendant who seeks corruptly to influence a federal officer must know by which sovereign the official is employed . . ." *id.* at 1312, and held that the sole element of *scienter* required was the corrupt nature of the offer. *Id.* Likewise, in proving an assault on a federal officer in violation of 18 U.S.C. § 111** it is unnecessary to prove knowledge

* (b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

** "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with . . . (a federal officer) . . . while engaged in or on account of the performance of his official duties, . . ."

on the assailant's part of the victim's status. *United States v. Feola*, 420 U.S. 671 (1975); *United States v. Lombardo*, 335 F.2d 414 (2d Cir.), *cert. denied*, 379 U.S. 914 (1964).

Similarly in crimes against property, proof of knowledge of government ownership of property is not required in a prosecution for robbery of property of the United States in violation of 18 U.S.C. § 2112. *United States v. Jermendy*, 544 F.2d 640, 641 (2d Cir. 1976); *United States v. Roundtree*, 527 F.2d 16 (8th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976). Also such knowledge is not a prerequisite in a prosecution for embezzlement of United States property in violation of 18 U.S.C. § 641. (Cases cited in *United States v. Roundtree*, *supra*, 527 F.2d at 18). Also a defendant need not know that deposits of a bank which he robbed were insured by the F.D.I.C. *United States v. Mauro*, 501 F.2d 45 (2d Cir.), *cert. denied*, 419 U.S. 969 (1974); *United States v. Licausi*, 413 F.2d 1118 (5th Cir. 1969), *cert. denied*, 396 U.S. 1006 (1970); nor does a receiver of stolen goods need know that they were stolen from interstate commerce. *United States v. Viruet*, 539 F.2d 295, 297 (2d Cir. 1976). "In cases of this kind the offender takes his victim as he finds him. The concept of criminal intent does not go so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of judicial forum." *United States v. Feola*, *supra*, 420 U.S. at 685.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

PATRICIA ANNE WILLIAMS,
GEORGE E. WILSON,
FREDERICK T. DAVIS,
*Assistant United States Attorneys,
Of Counsel.*



AFFIDAVIT OF MAILING

State of New York)
County of New York)

Patricia Anne Williams being duly sworn
deposes and says that he (she) is employed in the office of the
United States Attorney for the Southern District of New York.

Stating also that on the 11th day of July 1977
~~he~~ (she) served a copy of the within Appellee's Brief
by placing the same in a properly postpaid franked envelope
addressed:
David Berg, Esq.
Guaranty National Bank Building - 10th Floor
7500 Bellaire Boulevard
Houston, Texas 77036

Miles Jaffe, Esq
Norwick, Raggio, Jaffe & Kayser
2 Pennsylvania Plaza
New York, New York 10001

And deponent further says that ~~he~~ (she) sealed the said envelope
and placed the same in the mailbox for mailing at the United
States Attorney's Office, Southern District of New York, One
St. Andrew's Plaza, New York, N.Y. 10007, in the Borough of
Manhattan, City of New York.

Patricia Anne Williams

Sworn to me before this

day of

July 1977

Jeanette Ann Gray

JEANETTE ANN GRAYES
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1979

BEST COPY AVAILABLE

